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TO: Council Member Joe Biernat, Chair
and Members of the Public Safety and Regulatory Services Committee of the Minneapolis City Council

FROM: Timothy S. Skarda, Assistant City Attorney

DATE: November 8, 2002

RE: ***In the Matter of Las Americas, Inc.***
OAH File No. 1-6010-14421-3

BACKGROUND

At the October 2, 2002, meeting of the Public Safety and Regulatory Services Committee, Las Americas, Inc. brought a motion seeking a rehearing and reconsideration of the adverse action previously taken by the Committee on July 17, 2002, and approved by the City Council on July 26, 2002. In the alternative, Las Americas, Inc. sought remand of the case to the Office of Administrative Hearings ("OAH") for further factual findings and recommendations. The motion was based on the assertion that Las Americas, Inc. had obtained newly discovered evidence that substantially affected the basis for the adverse action recommended by the Administrative Law Judge ("ALJ") and adopted by the City Council.

After debate, the motion was referred to the City Attorney for a determination whether the information submitted in support of the motion constituted newly discovered evidence and for a recommendation on the procedure to follow regarding the motion.

STATUTES AND ORDINANCES

The standard to be applied in analyzing newly discovered evidence is well established.

The Minnesota Rules of Civil Procedure provide in Rule 59.01 that "[a] new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes: . . . (d) Material evidence newly discovered, which with reasonable diligence could not have been found and produced at the trial . . . . Rule 60.02 applies an identical standard when a party seeks relief from a judgment, after the time to request a new trial has passed.

The procedures of the Office of Administrative Hearings regarding requests for reconsideration or rehearing are governed by Minnesota Rule 1400.8300. The Rule provides:

> Once a judge has issued a report, unless that report is binding on the agency, the judge loses jurisdiction to amend the report except for clerical or

mathematical errors. Unless the report is a final order, binding on the agency, petitions for reconsideration or rehearing must be filed with the agency. Where the judge's decision is binding on the agency, a petition for reconsideration or rehearing shall be filed with the judge. The petition must be filed within a reasonable time but not after an appeal is taken nor more than one year after the decision was issued. Pursuant to Minnesota Statutes, section 14.64, a petition for reconsideration must be filed within ten days after the decision in order to toll the time for appeal to the court of appeals. A notice of and order for rehearing shall be served on all parties in the same manner prescribed for the notice of and order for hearing provided that the judge may permit service of the notice and order for rehearing less than 30 days prior to rehearing. The rehearing shall be conducted in the same manner prescribed for a hearing. In ruling on a motion for reconsideration or rehearing in cases where the judge's decision is binding on the agency, the judge shall grant reconsideration or rehearing if it appears that to deny it would be inconsistent with substantial justice and any one of the following has occurred:

A. irregularity in the proceedings whereby the moving party was deprived of a fair hearing;

B. accident or surprise that could not have been prevented by ordinary prudence;

C. material evidence newly discovered that with reasonable diligence could not have been found and produced at hearing;

D. fraud upon the hearing process;

E. mistake, inadvertence, or excusable neglect; or

F. the decision is not justified by the evidence, or is contrary to law; but unless it be so expressly stated in the order granting rehearing, it shall not be presumed, on appeal, to have been made on the ground that the decision was not justified by the evidence.

The OAH no longer has jurisdiction to hear the motion brought by Las Americas, Inc. The report of the ALJ is not binding on this Committee and is, therefore, not a final order under Rule 1400.8300. The ALJ report is a recommendation to the City. Las Americas, Inc. correctly directed its motion to this Committee. It is clear, however, that the OAH, if ruling on the motion, would be determining whether "material evidence newly discovered that with reasonable diligence could not have been found and produced at hearing" was being submitted.

CASE LAW

Before examining the evidence submitted by Las Americas, Inc. in support of the motion, it is important to review the law analyzing newly discovered evidence.

I. General standards.

It is clear that a new trial may be granted if material evidence has been newly discovered which, with reasonable diligence, could not have been found and produced at the trial. The trial court, or this committee, has broad discretion to determine whether or not this ground exists. Hertz v. Hertz, 304 Minn. 144, 229 N.W.2d 42 (1975); State v. Schoberg, 279 Minn. 145, 155 N.W2.d 750 (1968); Johnson v. Lorraine Park Apartments, Inc., 268 Minn. 273, 128 N.W.2d 758 (1964). However, if evidence was not discovered because of a lack of due diligence, a new trial will not be allowed. Vikse v. Flaby, 316 N.W.2d 276 (Minn. 1982).

A. Evidence must exist before the trial.

Newly discovered evidence is usually evidence that exists during the trial but was not discovered. Evidence available before a trial but procured after a trial will not support a new trial motions. Kozak v. Weis, 348 N.W.2d 798 (Minn. App. 1984). The courts have indicated that facts that occur after the trial should generally not be considered newly discovered evidence.

The Minnesota Supreme Court has granted a new trial for facts occurring after the trial, but indicated that this permission should be exercised very cautiously. See Gau v. J. Borgerding & Co., 177 Minn. 276, 225 N.W. 22 (1929); Podgorski v. Kerwin, 147 Minn. 103, 179 N.W. 679 (1920); In re In re Wood, 140 Minn. 130, 167 N.W. 358 (1918).

B. Evidence must be material.

The new evidence must be admissible evidence. Brown v. Bertrand, 254 Minn. 175, 94 N.W.2d 543 (1959); State v. E.A.H., 246 Minn. 299, 75 N.W.2d 195 (1956).

The newly discovered evidence must be such that it would likely affect the outcome of the case. Gruenhagen v. Larson, 310, Minn. 454, 246 N.W.2d 565 (1976); Cut Price Super Markets v. Kingping Foods, Inc., 256 Minn. 339, 98 N.W.2d 257 (1959).

Generally, newly discovered evidence which is merely cumulative, contradictory, or impeaching is not sufficient to warrant the granting of a new trial. Gruenhagen v. Larson, 310 Minn. 454, 246 N.W.2d 565 (1976); LeMieux v. Bishop, 296 Minn. 372, 209 N.W.2d 379 (1973); Minder v. Petersonk 254 Minn. 82, 93 N.W.2d 699 (1958).

C. Party seeking to introduce the evidence must have been reasonably diligent.

The courts have indicated that a party had been reasonably diligent if they took all reasonable steps prior to the end of the trial to obtain the evidence. Blake v. Denelsbeck, 284 Minn. 420, 170 N.W.2d 337 (1969). Courts consider a variety of factors to determine whether reasonable diligence has been exercised:

1. Whether a party has properly used discovery. Maras v. Stilinovich, 268 N.W.2d 541 (Minn. 1978);

2. Whether reasonable investigation has been conducted. Magnuson v. City of White Bear Lake, 295 Minn. 193, 203 N.W.2d 848 (1973);

3. Whether the same efforts that disclosed the evidence after trial would have led to its discovery prior to or during the trial. Caballero v. Litchfield Wood-Working Co., 246 Minn. 124, 74 N.W.2d 404 (1956);

4. Whether further inspection of data and files available during the trial would have produced the evidence. Lewin v. Proehl, 211 Minn. 256, 300 N.W. 814 (1941).

A party who knows of evidence before or during the trial will not be able to later claim the information as newly discovered. LeMieux v. Bishop, 296 Minn. 372, 209 N.W.2d 379 (1973); State v. Schoberg, 279 Minn. 145, 155 N.W.2d 750 (1968). Similarly, a party who knows about evidence but makes no attempt to procure a continuance nor to present the information at trial is not entitled to a new trial. Kubat v. Zika, 193 Minn. 522, 259 N.W. 1 (1935).

The doctrine of newly discovered evidence does not allow a party to rethink or reconsider trial tactics and decisions. For instance, an attorney who has information but fails to appreciate its factual or legal significance is unable later to propose the evidence is newly discovery. Johnson v. Lorraine Park Apartments, Inc., 268 Minn. 273, 128 N.W.2d 758 (1964). Trial decisions made by an attorney regarding the need for certain witnesses or the materiality of certain evidence, do not permit a new trial on grounds of new discovered evidence. Nelson v. Dahl, 174 Minn. 574, 219 N.W. 941 (1928); Farrington v. Farrington, 117 Minn. 272, 135 N.W. 815 (1912).

C. Burden of proof is on the moving party.

The party seeking a new trial has the burden of showing that the evidence could not have been found and produced at the trial and that the evidence would have a material effect on the outcome of the case. State ex rel. Pula v. Beehler, 364 N.W.2d 860 (Minn. App. 1985). The moving party must also establish facts that describe efforts made to obtain the information before it was newly discovered.

PROCEDURE

The *License Adverse Action Procedures Manual* does not address the procedure for deciding post-hearing motions. I spoke to Kenneth A. Nickolai, the Chief Adminstrative Law Judge, at the Office of Administrative Hearings. He confirmed that the decision from the ALJ is a recommendation to the City of Minneapolis and the jurisdiction of the OAH has terminated. Currently, the OAH considers the file closed when the ALJ report is forwarded to the City. If requested, Chief Judge Nickolai indicated that the OAH could handle motions for the City. The procedure for post-hearing motions will be addressed in future revisions of the *License Adverse Action Procedures Manual.*

Las Americas, Inc. has alleged two motions in the alternative. First, Las Americas, Inc. has asked this Committee to reconsider or rehear its decision on the adverse action taken against the Respondent. The consideration of the first motion is clearly within the providence of this Committee. The Committee is being asked to reconsider its decision based on the newly discovered evidence submitted by Las Americas, Inc.

The second, or alternative, motion asks the Committee to refer the motion to the OAH for further findings and recommendations.

The role of the Committee at the July 17, 2002, hearing was to hear the arguments of counsel and decide what, if any, adverse action was appropriate. The *License Adverse Action Procedures Manual* provides that the Committee was not to hear additional testimony or accept new evidence. The decision of the Committee was to be limited to the evidence in the record, that is, the testimony and evidence submitted to the ALJ.

RECOMMENDATION

Pursuant to the staff directive of October 2, 2002, all the evidence that Las Americas, Inc. has alleged as newly discovered has been reviewed, as well as, the submissions to the Committee by all parties. Additional argument from Las Americas, Inc. contained in a letter dated October 4, 2002, was also considered.

I. It is our recommendation that the information submitted by Las Americas, Inc. should not be considered by this Committee.

The submissions proposed by Las Americas, Inc. were not part of the record before the ALJ and are not proper for consideration by the Committee. The submissions should only be considered by this Committee if the ALJ determines that the submissions are newly discovered evidence and incorporates them into the record.

II. Is our recommendation that the record before the Committee should not be opened to allow for additional testimony or the submission of evidence.

The motion for reconsideration could be treated as a request for the Committee to take testimony and to admit evidence. We recommend that the motion be denied. The *License Adverse Action Procedures Manual* specifically limits the record to submission made to the ALJ. The purpose of this limitation is to provide a separate impartial fact finder to the license holder. To the extent that the Committee hears and decides evidentiary issues that purpose is subverted.

III. It is our opinion that the proposed submissions do not constitute newly discovered evidence.

While it is our recommendation that the exhibits not be considered by the Committee for the reasons stated above, it is also our opinion that the proposed evidence does not constitute material evidence newly discovered that with reasonable diligence could not have been found and produced at the hearing.

The proposed evidence consists of numerous photographs of alleged ordinance violations similar to those sustained by the ALJ against Las Americas, Inc. None of the photographs were contemporaneous with the violations alleged against Las Americas, Inc. The photographs do not contain any expert report or analysis indicating that the photographs depict actual violations. The proposed evidence does not contain any expert report or analysis regarding the violation history of the business depicted. The photographs were taken on July 6 and July 7, 2002, and were available to Las Americas, Inc. for the Committee meeting of July 17, 2002.

We do not believe that the proposed evidence is material or admissible. It does not deal with the specific allegations made against Las Americas, Inc. and is vague and conclusory. We not believe that Las Americas, Inc. has been reasonably diligent in seeking admission of the evidence. The evidence existed prior to the July 17, 2002, hearing and Las Americas, Inc. did not propose it to the Committee. Las Americas, Inc. was allowed discovery in the ALJ process and could have obtained information concerning violations at other businesses. Data and files available to Las Americas, Inc. would have allowed the business to produce similar evidence at trial. Las Americas, Inc. made a tactical decision not to introduce the evidence or a similar type of evidence at trial and now seeks to rescind that decision by treating the evidence as newly discovered. We do not believe that such evidence falls within the doctrine allowing for the consideration of newly discovered evidence.

IV. It is our recommendation that the motion to reconsider the adverse action taken regarding Las Americas, Inc. on July 17, 2002, be denied.

Because the proposed exhibits are outside the record and do not constitute newly discovered evidence, the motion to reconsider should be denied.

V. It is our recommendation that the submissions, exhibits and arguments of counsel be forwarded to the Office of Administrative Hearings for a ruling whether the court finds them to be newly discovered evidence warranting additional actions by the court.

Even thought the Office of Administrative Hearings will be applying a similar standard in addressing the issue of newly discovered evidence to that outlined above, we do not feel that it is within the purview of this Committee to decide for the Administrative Law Judge whether Las Americas, Inc. has sustained its burden of proof.

The ALJ, in addition to his general knowledge of trial and evidentiary issues, has reviewed the evidence, ruled on pre-trial motions, heard the testimony and issued a report and findings. The ALJ is able to properly weight the proposed evidence and determine what, if any, impact it would have on his decision.

The referral to the Office of Administrative Hearings should be for the limited purpose of ruling on the motion brought before this Committee.